Supreme Court, U.S.

06-1[illegible] 2006

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CULPEPPER & CARROLL, PLLC
Petitioner,

v.

CONNIE D. COLE,
Respondent.

ON APPLICATION FOR
WRITS OF CERTIORARI AND/OR
WRITS OF REVIEW OF THE
SUPREME COURT OF THE
STATE OF LOUISIANA,
WHICH DECISION REVERSED
A DECISION OF THE
COURT OF APPEAL, SECOND CIRCUIT,
STATE OF LOUISIANA

PETITION FOR WRITS OF CERTIORARI AND/OR WRITS OF REVIEW

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QUESTIONS PRESENTED

1. Can a State deprive an attorney of attorney's fees in a contingent fee contract where the client agrees to a settlement and then changes his mind?

2. Does an attorney have any property rights protected by the United States Constitution in a contingent fee contract?

3. Can a State Supreme Court fail to follow jurisprudence and statutes and rely on Rules of Professional Conduct (administrative rules) to deprive an attorney of attorney's fees?

4. Can a State Supreme Court disregard its own rules governing Application for Writs, content of briefs and time schedule in order to assist a litigant in not having to pay attorney's fees under contingent fee contract?

LIST OF PARTIES

The parties below are listed in the caption.

Culpepper & Carroll, PLLC

Connie D. Cole

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OPINION BELOW

Connie Daniel Cole registered a complaint with the Office of the Disciplinary Counsel, Louisiana Attorney Disciplinary Board in connection with Bobby L. Culpepper not following his instructions as to the handling of a case, after Mr. Cole had changed his mind and decided not to settle. The Louisiana Attorney Disciplinary Board in a letter dated April 30, 2003 found that no formal disciplinary action was appropriate.

Thereafter, Culpepper & Carroll, PLLC filed a petition for attorney's fees in the Ruston City Court, Ruston, Louisiana. A Judgment for attorney's fees in the amount of $6,950.01 was rendered by the Ruston City Court, with the Judgment being signed on the 14th day of July, 2004.

Mr. Cole appealed in forma pauperis to the Second Circuit Court of Appeal of the State of Louisiana. While said appeal was granted, the Second Circuit Court of Appeal of the State of Louisiana affirmed a decision of the First Judicial District Court, Parish of Caddo, State of Louisiana, failing to invalidate the Last Will and Testament of Mr. Cole's mother, Mrs. Annie Ruth Conley Cole Brown. See *Succession of Annie Ruth Conley Cole Brown* (La. App. 2 Cir. 10/27/04), 886 So. 2d 633. The *Succession of Brown* involved Mr. Cole, after Mr. Culpepper had refused to pursue the case and after a second attorney had refused the case, representing himself in District Court and losing the case that forms the background of this entire matter.

That the matter was briefed and argued in the Second Circuit Court of Appeal, State of Louisiana, with the decision being handed down on March 9, 2005 with two Judges agreeing on the decision affirming the Ruston City Court, and one Judge dissenting. Mr. Cole filed an Application for a Re-Hearing which was denied on March

31, 2005, with three Judges agreeing with the original opinion and two Judges voting to grant a re-hearing.

Mr. Cole filed an Application for Writs with the Louisiana Supreme Court which were granted. A decision was rendered by the Louisiana Supreme Court on April 4, 2006. Believe it or not, the decision was a "per curiam" decision.

Culpepper & Carroll, PLLC timely applied for a re-hearing which was denied by the Louisiana Supreme Court on the 23rd day of June, 2006.

STATEMENT OF JURISDICTION

The Supreme Court of the State of Louisiana denied the Application for a Re-Hearing on June 23, 2006, as set forth hereinabove.

Pursuant to 28 Federal Rules of Civil Procedure, 1257, your petitioner seeks a review of the Supreme Court of the State of Louisiana decision which reversed a decision of the Second Circuit Court of Appeal, State of Louisiana and apparently disagreed with the decision of the Louisiana Attorney Disciplinary Board although denying Connie Cole's Application for an Appeal of the decision of the Disciplinary Board.

This matter is of the utmost importance to any attorney in the United States who handles contingent fee contract cases. Its importance is noted by the fact that the writer has been contacted by the *American Bar Association Journal* and the ruling of the Supreme Court has been publicized on the front page of the New Orleans *Times Picayune* and has been the subject of discussion at ethic seminars and judges meetings in the State of Louisiana.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment 14.

. . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

42 U.S.C Sec. 1983.

Every person has a claim secured by the Constitution and laws of the United States of America for the deprivation of any rights.

La. R.S. 37:218.

"By written agreement signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit . . ."

Louisiana Civil Code Article 2014.

A contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the interest of the obligee.

Louisiana Civil Code Article 2018.

Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made. If restoration in kind is impossible or impracticable, the court may award damages.

If partial performance has been rendered and that performance is of value to the party seeking to dissolve the contract, the dissolution does not preclude recovery for that performance, whether in contract or quasi-contract.

Louisiana Civil Code Article 3010.

The principal is bound to the mandatary to perform the obligations that the mandatary contracted within the limits of his authority. The principal is also bound to the mandatary for obligations contracted by the mandatary after the termination of the mandate if at the time of contracting the mandatary did not know that the mandate had terminated.

The principal is not bound to the mandatary to perform the obligations that the mandatary contracted which exceed the limits of the mandatary's authority unless the principal ratifies those acts.

Louisiana Civil Code Article 3012.

The principal is bound to reimburse the mandatary for the expenses and charges he has incurred and to pay him the remuneration to which he is entitled.

The principal is bound to reimburse and pay the mandatary even though without the mandatary's fault the purpose of the mandate was not accomplished.

Louisiana Civil Code Article 3020.

The principal is bound to perform the contract that the mandatary, acting within the limits of his authority, makes with a third person.

Louisiana Civil Code Article 3028.

The principal must notify third persons with whom the mandatary was authorized to contract of the revocation of the mandate or of the mandatary's authority. If the principal fails to do so, he is bound to perform the obligations that the mandatary has undertaken.

STATEMENT OF THE CASE

Following the dismissal of the complaint by the Office of the Disciplinary Counsel under Louisiana Attorney Disciplinary Board, demand was made upon Mr. Cole for payment of one-third (1/3) of the amount of $21,600.03 which was the amount of the proposed settlement. Mr. Cole refused to pay anything.

We will now quote directly from the facts found by the Court of Appeal:

> "On April 12, 2004, Culpepper & Carroll, PLLC ("Culpepper"), filed a petition on open account in Ruston City Court against Connie D. Cole ("Cole") seeking $6,950.01, plus legal interest, together with an additional 25 percent on both the principal and interest as attorney's fees. Attached to the petition were a November 12, 2004 demand letter and a November 3, 2003 invoice in the amount of $6,950.01 for attorney's fees in connection with a matter entitled 'Succession of Annie Ruth Brown.' The invoice indicated that the balance due was calculated by taking one-third of $21,600.03 and subtracting from it a $250.00 credit, representing advance court costs paid by Cole. Evidence adduced at the subsequent trial showed that the $21,600.03 represented the amount of a settlement that Culpepper had negotiated with opposing counsel in the succession matter in which Culpepper represented Cole. Thus, the $6,950.01 represented a fee Culpepper claimed had been earned pursuant to a contingent fee contract entered into between Culpepper and Cole.

Cole filed an answer stating that 'Mr. Culpepper did this on a contingency fee basis,' that Culpepper 'quit the case' and that Cole paid Culpepper for court costs, but Culpepper 'would not go to court.' In a written explanation of his answer, Cole admitted that he consulted with Culpepper on the succession of Annie Ruth Brown, but Cole asserted that he refused any more consultation from Culpepper and pursued the case on his own behalf. He stated that the settlement amount that Culpepper had attempted to get Cole to accept left Cole 'feeling as if his counsel was unfaithful and leaving him virtually unrepresented.' Cole attached to this answer a copy of a letter from Culpepper to Cole dated September 20, 2000. The letter indicated that Culpepper would handle Cole's legal representation in the succession of Annie Ruth Brown on a contingent fee basis for 'one-third of whatever additional property or money we can get for you.' The letter also acknowledged that Cole had already advanced $250.00 for estimated court costs. The letter then discussed legal issues that Culpepper considered pertinent in the matter, noted that the net value of the estate was $183,000 and indicated that Culpepper considered one-eighth of the estate, or $22,900, to be the maximum Cole could get if Cole could be considered a forced heir. Thus, Culpepper's letter indicated to Cole that, since Cole already had received $2,500 in value, $20,400 would be the maximum amount Cole could expect to win in the case.

In addition, the letter indicated that Culpepper probably could get opposing counsel to recommend a settlement to his clients, although they obviously would not pay the entire amount because the law

was unclear concerning forced heirship issues under the facts of this case.

When the matter came on for trial on July 14, 2004, counsel for Culpepper first called Cole as an adverse witness. Cole generally was unresponsive as a witness, but did make some critical admissions. Cole admitted that, under the 'so-called' will, Cole would have received $2,500 in land, and Cole remembered Culpepper 'saying something about if I got a one-eighth interest, but you also told me I didn't qualify for that.' Cole then was asked if his counsel had informed him that the estate was willing to pay Cole an additional $21,603 in real estate. Cole responded affirmatively, but stated that he was unsatisfied with that figure. Cole testified as follows regarding the contingent fee agreement:

> Q: (by Culpepper) Okay, but when you came to see me, you didn't have money to pay on an hourly basis. You wanted me to charge a contingent fee of one-third of whatever additional amount of money I could get the people to agreed to pay you voluntarily or through court, did you not?
>
> A: (Cole) On, on a -- uh, we agreed on a contingent fee.

Cole was then asked if he had given counsel the authority 'to go ahead and make the best settlement that we could' based upon counsel's opinion that if the case went to trial, Cole would lose and would get no more money. Cole responded, '[t]hat's based on your opinion, but on my opinion, I believe that, uh, I would get more.'

When asked if Cole had terminated his counsel's services, Cole responded that he did not know, but that he had asked counsel 'off of the case.' Cole also admitted reporting his counsel to the Bar Association after counsel 'quit,' and that, after retaining new counsel, Cole eventually reported him to the Bar Association as well. Cole also admitted reporting the attorney representing the estate to the Bar Association.

Finally, when asked if he had received a certified letter demanding payment of the $6,950.01, Cole indicated that he received a certified letter, but stated, 'I don't exactly recall what was on the certified letter. . .'

The next witness was Bobby Culpepper of the plaintiff law firm. Culpepper indicated that Cole had first contacted his office in 2000 to complain about Cole's mother's will which had left him only $2,500. According to Culpepper, Cole felt that he should be a forced heir, and there was some discussion concerning whether the forced part would be one-eighth or less than one-eighth. Culpepper testified that he concluded Cole's share probably would be less than one-eighth; but, if Cole received one-eighth of the estate, his share would have been $22,900, so that when the $2,500 was subtracted, Cole stood to get an additional $20,400. Culpepper testified that, after doing substantial research, he determined that Cole could not win. According to Culpepper, Cole 'authorized me, at that time, to work out the best settlement that we could work out.'

Culpepper then negotiated a settlement in which Cole would get property worth an additional

$21,600, which was more than Cole would get if he had been able to establish that he was a forced heir. Culpepper, however, testified that, when the time came to sign settlement papers, Cole would not sign. Culpepper then informed Cole that, because Culpepper did not think Cole could win the case, Culpepper was not going to litigate something 'that I felt could not be won and particularly when we were getting more than we would get if we won.' Culpepper then sent Cole certified demand letters seeking the $6,950.01 representing one-third of the additional value of the property which Cole would have received if he had accepted his counsel's recommendation.

The court asked Mr. Culpepper if there was a written contract for the contingent fee agreement. Mr. Culpepper responded:

> We had a letter agreement, Your Honor. A letter dated September 20, 2000 is attached to his lawsuit. The first paragraph of that as per our agreement handles this matter on a contingency fee basis of one-third of whatever additional property or money we can get for you. And he was agreeable to that because he could not afford to pay on any hourly basis, so he-- and, in fact, in papers that are attached to his--to his answer, Your Honor, defendant's answer, he said Mr. Culpepper did this on a contingency fee basis, so there's no question about being an agreement. The, uh, disciplinary board found that there was a contingency fee contract.

When Mr. Cole took the stand on his own behalf, the court asked him if he asked Mr. Culpepper for

a contingent fee arrangement, to which Cole responded, 'I asked for a contingency fee arrangement.' The court asked Cole if Mr. Culpepper had explained to him that he would 'try to get whatever he could,' and whether he explained to Cole why Cole did not need to go to court in the case. Cole responded:

> He told me, and I felt that, you know, we could go to court and I felt we could win if I had representation.

After hearing closing statements, the court concluded that the evidence showed a 'contingency fee was present' based on the record, including attachments, letters, testimony in open court and the written admission in Cole's answer that there was a contingent fee arrangement. The court noted that the 'work was accomplished' and further noted that, according to the testimony, the results obtained would have been better than if the case had gone to trial on the issue of forced heirship. Thus, the court was satisfied that the plaintiff had met the burden of proof. This appeal followed."

ARGUMENT

1. Can a State deprive an attorney of attorney's fees in a contingent fee contract where the client agrees to a settlement and then changes his mind?

The Louisiana Supreme Court in the case of *Saucier vs. Hayes Dairy Products*, 373 So. 2d 102 (La. 1979), stated that the holding would "likewise thwart the client's last minute attempt to supplant his original attorney with another or to proceed in proper person so as to obviate responsibility for payment of a contingent fee after substantially all of the legal services contemplated by the contract have been performed and settlement or judgment has been obtained or is imminent." That rationale certainly applies to this case because that is exactly what took place. Additionally, in the case of *Frances vs. Hotard and Audubon Insurance Company*, 798 So. 2d 982, 2000-0302 (La. App. 1st Cir. 03/20/01), the Court found that the attorney continued to have a cause of action for fees against his former client even though the client had subsequently moved to dismiss his suit for damages. In the case of *Menard vs. Hyatt*, 773 So. 2d 908, 00-1047 (La. App. 3d Cir. 12/6/00), the Court found that, due to the express language of the contingency agreement, the attorney was not entitled to recover expenses which he had incurred during his representation in the absence of a judgment or settlement. Unlike the contingency agreement in our case, the contingency agreement at issue therein provided for payment out of settlement or judgment. The Third Circuit has confirmed that, an apportionment of attorney's fees between subsequent attorneys, one of the critical determinations of fact is whether or not settlement was imminent. *Syrie vs. Schilab*, 664 So. 2d 529 95-491 (La. App. 3d Cir. 11/02/95). Also, in the case of *Gordon vs. Levet*, 643 So. 2d 371, 94-279 (La. App. 5th Cir. 09/27/94), the Court found that the initial attorney's fees were

"effectively earned" when he received in settlement documents from the insurance company.

The failure to agree to settle the case was not raised as a defense at any point and is not a valid defense. Mr. Cole simply changed his mind at some point in time after giving Culpepper the authority to negotiate the best settlement he could and after a settlement being negotiated. If this matter had been raised as a defense, there are numerous letters and in fact, settlement papers that would have been introduced into evidence.

The Louisiana Supreme Court apparently feels that a client has complete control in a contingency fee agreement contract. We do not find any jurisprudence to that effect. Under La. R.S. 27:218, the attorney actually acquires an interest in the subject matter. How would that give the client complete control? Although our contingency fee agreement doesn't not provide for a percentage over 50%, what would happen if it did? Would that give the attorney full control or who would have control?

In *Tschirn vs. Tschirn*, (La. App. 5th Cir. 11/14/90) 570 So. 2d 204, which was completely ignored by the Louisiana Supreme Court, both the Trial Court and the Court of Appeal stated "that the purpose of La. R.S. 37:218 is to protect the attorney, not to allow the client to deprive the attorney of his earned fee. . ."

The Court of Appeal cited the case of *Hayes vs. Rollins*, (La. App. 3d Cir. 7/21/83) 435 So. 2d 1151 in support of its position herein.

The *Hayes* case involved a situation where the client refused to sign the settlement agreement or endorse a check in the amount of $30,000.00 and suit was filed for the attorney's fees. Attorney's fees were denied in this matter

because it was determined that the attorney did not have the authority to settle the case. The *Hayes* court noted:

> ". . . The record in this case is totally devoid of any evidence demonstrating that the defendant ever consented in any manner whatsoever to the settlement confected by the plaintiff (attorney.) Thus the District Court was correct in determining there was no settlement of the defendant's claim."

In the instant matter, the Court of Appeal determined that there was consent to settle.

The *Hayes* case cites the case of *Doucet vs. Standard Supply & Hardware Company*, (La. App. 3d Cir. 1971), 250 So. 2d 549. In the *Doucet* case, the client agreed to settle and then changed his mind and fired the attorney and employed other counsel to represent him. There is no evidence whatsoever that the case was ever settled. There was a jury trial where the jury awarded attorney's fees. The award was affirmed by the Court of Appeal. That case is on all fours with the instant case. In fact, the instant case is stronger than the *Doucet* case because in the instant case, it was a case that could not be won and that was not at the district level or the Court of Appeal level.

This Honorable Court is called upon to determine a question of property rights insofar as attorneys are concerned and must determine whether or not an attorney has any protection where the client is entirely unreasonable. That is the situation in the instant case and the court records, including the adverse Court of Appeal decision in *Succession of Brown*, (La. App. 2d Cir. 2004), 886 So. 2d 633 shows that. Instead of receiving $21,603.00, Mr. Cole received zero. Mr. Cole was fully advised as to what the law was by Culpepper; gave approval to settle the case, then changed his mind. Who should be penalized - Cole or Culpepper?

The Supreme Court of the State of Louisiana relied on its decision in *Saucier vs. Hayes Dairy Products* (La. 12/15/78), 373 So. 2d 102. That case is an interesting case, but is not authority for denial of liability in the instant case. In the *Saucier* case, according to Chief Justice Sanders:

> "The issue presented is whether an attorney discharged by his client without cause prior to the completion of his services is entitled to the percentage fee stipulated in his contingent fee contract, drawn and recorded in conformity with LSA-R.S. 37:218, when the client subsequently recovers from the adverse party. The Court of Appeal allowed recovery. We affirm."

What the original decision of the Supreme Court of the State of Louisiana did in that case, as pointed out by Justice Dennis in a dissent concurred in by Justices Calogero and Tate, was to divide the recovery of $75,000.00 with the plaintiff getting one-third and each of the attorneys getting one-third, whereas the original contingent fee agreement was for only one-third. The client ended up paying twice the contingency fee agreement.

Now Chief Justice Calogero of the Supreme Court of the State of Louisiana on re-hearing, noted a change in the composition of the Court and held (rightfully so) that the client should only have to pay one contingency fee of one-third, not two and there should be some division between the lawyers of the one-third. Justices Summers, Dixon and Marcus dissented.

A question similar to the question raised in this case was presented in the case of *Smith vs. Ford Motor Company*, 1999 U. S. Dist. Lexis 13037 in which former counsel for plaintiff filed a motion to enforce the settlement of the action arising from plaintiff's injury caused by a faulty lift-gate on a

truck manufactured by the defendant. In that case plaintiff agreed to a settlement in writing but wrote a letter to her attorney the same day rejecting the settlement. The Court enforced the settlement.

Also, consideration should be given to the case of *Williams vs. Vito*, 365 N.J. Super. 225; 838 A. 2d 556; 2003 N.J. Super. Lexis 403 in which the overview of that case states as follows:

> "The victim testified that he rejected the $10,000.00 offered by the motorist, but his counsel claimed the victim accepted the offer. The day after the settlement, the victim called his counsel and said he wanted to go to trial. The court found the victim had reluctantly accepted the offer. The settlement could not be repudiated on grounds of gross inadequacy of consideration, as $10,000.00 was not clearly inadequate, since (1) as the seriousness of plaintiff's injuries was in question, and there was evidence he had a pre-existing condition, he might not have been able to surmount the verbal threshold; (2) policy limits were $25,000.00; (3) the victim's counsel, an experienced trial lawyer, would presumably have advised him to reject the offer if he felt it were clearly inadequate. That the settlement was oral did not make it unenforceable. A contrary rule would mean that attorneys and judges could not rely on a telephone message that a settlement was consummated. Finally, as there was an apparent miscommunication between the victim and counsel as to whether the amount was gross or net, it was fairer to make counsel bear the burden. Thus, the entire $10,000.00 had to be paid to the victim."

This was not a case where there was a chance at the trial that Mr. Cole would get more money. The chance of getting anything except what the Will gave him at the trial was zero. In fact, there was a trial where he got zero.

This is not a case where no offer to settle was made, but Culpepper still thought he should get paid without going through a trial. An offer was made in the amount of $21,600.00 more than the Will gave Mr. Cole. This offer was a negotiated offer after Mr. Cole had authorized Culpepper to make the best deal that could be made. This is not a case where the case might have been won on appeal. There was an appeal and Mr. Cole lost.

This was not a case where a nominal amount, cost to defend type settlement, 50% of judgment value, even 100% of judgment value was offered. More than judgment value was offered and initially accepted with Mr. Cole later changing his mind.

Culpepper wanted to do this matter on an hourly basis. Mr. Cole had no money and had already been turned down by a very competent attorney. Mr. Cole wanted a contingent fee agreement.

Can a client orchestrate a contingent fee agreement, refuse a settlement for more than the amount he would get if he won the case, refuse a settlement after authority is given by him to settle, gamble and lose, thus destroying the contingent fee agreement and leave the attorney holding the bag? Is that what a contingent fee agreement is supposed to do? I do not believe so and do not believe that this Honorable Court will so rule.

Apparently, what Mr. Cole wanted was to have a trial at Culpepper's expense - come hail or high water! The money apparently did not make him any difference. His family had

done him wrong so he wanted to force them through a trial and appeal - like he did - to get back at them. We do not believe this Honorable Court is going to approve that.

Was Culpepper supposed to drive 180 miles roundtrip, spend a day or two in court in Caddo Parish, lose the case, not even be able to collect expenses and have no remedy? Think about it!

The *Saucier* case is cited by the Supreme Court of the State of Louisiana for the proposition that a client has "a fundamental right to control the case" although the *Saucier* case does not say it. It does say that he has an absolute right to discharge the attorney, but it does not say that he can discharge the attorney and have no responsibility to pay attorney's fees.

What does the Supreme Court of the State of Louisiana mean when it says that a client has a "fundamental right to control the case?" Does it mean the following?

1. The client, who knows nothing about drafting petitions, can require an attorney to draft the petition however the client wants the petition drafted;

2. The client determines who will be witnesses;

3. The client determines what questions will be asked the witnesses;

4. The client determines what argument will be made to the Court, even if it makes no sense;

5. The client determines what experts will be utilized;

6 The client determines whether or not experts will even be utilized;

7. The client control what is put in the brief;

8. The client determines whether or not to file exceptions, affirmative defenses, etc.?

The Louisiana Supreme Court cited Rule 1.2 (A) of the Rules of Professional Conduct stating:

> "A lawyer shall abide a client's decision whether to settle a matter."

Undersigned counsel abided by the above rule and the case was not settled. The question is not whether or not an attorney has to abide by the client's decision to settle. The question in this case is that once a client has agreed to settle a case and a very favorable settlement is made, and the client then changes his mind in a case where the case is worth zero and that he cannot win the case, is the attorney entitled to recoup anything? Therefore, Rule 1.2(a), which is an administrative rule, does not support the decision of the Supreme Court of the State of Louisiana.

In this matter, Mr. Cole simply changed his mind and rejected the settlement. As a principal, he should be bound under the provisions of Louisiana Civil Code Articles 3010 and 3020.

The provisions of the Louisiana Civil Code dealing with contracts, i.e., Articles 2014 and 2018 and the Articles dealing with mandate (Article 3012) support our position in this matter. It does seem strange that this Honorable Court relies upon the rules of Professional Conduct (which we do not feel were properly applied) instead of upon the Civil Code. The Civil Code is statutory law, whereas the rules of Professional Conduct, according to the case previously cited, are administrative rules.

We would note that the fact that a client can terminate a mandate at any time (Louisiana Civil Code Article 3028) does not necessarily mean that he can dissolve or avoid attorney's fees.

2. Does an attorney have any property rights protected by the United States Constitution in a contingent fee contract?

We have previously quoted the provisions of La. R.S. 37:218 which give an attorney an interest in the subject matter of the suit. Obviously this is a property right which is protected by the 14th Amendment to the United States Constitution and 42 U.S.C. Section 1983.

3. Can a State Supreme Court fail to follow jurisprudence and statutes and rely on Rules of Professional Conduct (administrative rules) to deprive an attorney of attorney's fees?

Chief Justice Summers of the Louisiana Supreme Court, in a dissent in *Saucier*, supra, stated:

> ". . . The cannons of professional responsibility are merely 'administrative' rules to this court enacted to regulate the practice of law . . ."

With all due respect, the Supreme Court of the State of Louisiana instead of following statutory law or jurisprudential law has relied entirely upon a cannon of professional responsibility.

4. Can a State Supreme Court disregard its own rules governing Application for Writs, content of briefs and time schedule in order to assist a litigant in not having to pay attorney's fees under contingent fee contract?

The Louisiana Supreme Court did not follow its own rules in handling the Application for Writs, briefing and argument in this matter, in the following respects:

1. The writ application does not comply with Rule X which is mandatory - note the use of the word "shall". There was no argument on the assignment of errors and no summary. The index was incomplete. The attachments were incomplete.

2. No legal authority was cited by Mr. Cole in support of his position. He did cite Judge Judy and Judge Joe Brown.

3. The Southern University Legal Clinic was appointed to assist Mr. Cole and we question the authority for same.

4. The brief filed by the Southern University Legal Clinic was allowed to be filed six months after the original brief was due.

5. The Louisiana Supreme Court allowed a brief to make an untimely assignment of error not raised in the Writ Application.

6. At a minimum, the Supreme Court should have remanded, in accordance with the dissenting opinion in the Court of Appeal for hearing on quantum meruit.

In *Saucier*, this Court determined that the amount set forth in a contingent fee contract, not quantum meruit is the proper "frame of reference for fixing compensation for the attorney prematurely discharged without cause." It does not appear that this was really an issue. The Court chose a

method that would give the attorney greater compensation than a quantum meruit basis.

However, as later pointed out by this Honorable Court in *O'Rourke vs. Cairns*, (La. 1996), 683 So. 2d 697, in another very scholarly decision as opposed to the per curiam decision herein, the Court's ruling in *Saucier* actually resulted in awards that were on a quantum meruit basis. This is the situation dealt with in the *O'Rourke* case. In *O'Rourke*, the attorney was dismissed for cause. It seems that the award in the *O'Rourke* case was almost the exact same figure as if Mr. Belsom had been paid on an hourly basis. That hourly basis would have been $62,500.00. This Court approved a recovery of $61,800.00 or $309.00 per hour.

This Court talked about a "modified quantum meruit analysis." Again, we cannot understand either of these cases as standing for the proposition that in a case of this nature quantum meruit recovery should not or cannot be allowed.

CONCLUSION

The only conclusion that can be reached in this matter is that the Supreme Court of the State of Louisiana was wrong because of the multiplicity of reasons set forth in the argument herein. The decision should be reversed and the opinion of the Court of Appeal of the Second Circuit, State of Louisiana, should be re-instated, or, alternatively, the matter should be remanded to the Ruston City Court for hearing on quantum meruit or other theories of recovery.

Respectfully submitted,

BOBBY L. CULPEPPER*
TERESA C. CARROLL
J. CLAY CARROLL
525 East Court Avenue
Jonesboro, LA 71251
318/259-4184

* Counsel of Record

Attorneys for Petitioner

Supreme Court, U.S.
FILED
06-159 JUL 27 2006
OFFICE OF THE CLERK

(2)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

CULPEPPER & CARROLL, PLLC
Petitioner,

v.

CONNIE D. COLE,
Respondent.

ON APPLICATION FOR
WRITS OF CERTIORARI AND/OR
WRITS OF REVIEW OF THE
SUPREME COURT OF THE
STATE OF LOUISIANA,
WHICH DECISION REVERSED
A DECISION OF THE
COURT OF APPEAL, SECOND CIRCUIT,
STATE OF LOUISIANA

APPENDIX TO PETITION FOR WRITS OF CERTIORARI AND/OR WRITS OF REVIEW

BOBBY L. CULPEPPER*
TERESA C. CARROLL
J. CLAY CARROLL
525 East Court Avenue
Jonesboro, LA 71251
318/259-4184

* Counsel of Record

Attorneys for Petitioner

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LOUISIANA ATTORNEY DISCIPLINARY BOARD
OFFICE OF THE DISCIPLINARY COUNSEL
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Rouge, Louisiana 70816
(225) 293-3900 * 1-800-326-8022 * FAX (225) 293-3300
April 30, 2003

Bobby L. Culpepper, Esq.
525 E. Court Street
Jonesboro, LA 71251-3437

Re: Respondent: Bobby L. Culpepper
Complainant: Connie Daniel Cole
File No.: 0015341

Dear Mr. Culpepper:

The Office of Disciplinary Counsel has completed its investigation in the above captioned matter. It is our determination that there is not clear and convincing evidence to support the complainant's allegations of unethical conduct against you. Accordingly, we have dismissed this complaint.

Under Supreme Court Rule XIX, Sec. 11B(3), the complainant has the right to request an independent review of this decision. If a review is requested which results in this matter being reopened, you will be advised. Otherwise, you may consider this matter concluded.

Thank you for your cooperation in this matter.

Sincerely,
Signed by Robert S. Kennedy, Jr.
Robert S. Kennedy, Jr.
Deputy Disciplinary Counsel

RSK/dj

LOUISIANA ATTORNEY DISCIPLINARY BOARD
OFFICE OF THE DISCIPLINARY COUNSEL
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Rouge, Louisiana 70816
(225) 293-3900 * 1-800-326-8022 * FAX (225) 293-3300
April 30, 2003

Connie Daniel Cole
P. O. Box 193
Grambling, LA 71245

Re: Respondent: Bobby L. Culpepper
Complainant: Connie Daniel Cole
File No.: 0015341

Dear Mr. Cole:

After evaluating your complaint and the response of the attorney, it is our decision that no formal disciplinary action is appropriate. We have reviewed your allegations in light of an attorney's obligations as outlined in the Rules of Professional Conduct. We find no clear and convincing evidence that a violation of the Rules has occurred. Therefore, we are dismissing your complaint. We will nonetheless maintain a copy of your complaint on file for a period of three (3) years.

You have the right to file a written request for review of this decision by a hearing committee. If you want this review, you must file a written request with our office within thirty (30) days of the receipt of this letter. You should state in detail what ethical misconduct you believe was committed by the attorney and what evidence you have submitted to establish this misconduct.

We appreciate your concern for the maintenance of professional standards by all attorneys practicing law in our state.

Sincerely,

Signed by Robert S. Kennedy, Jr.
Robert S. Kennedy, Jr.
Deputy Disciplinary Counsel

RSK/dj
cc: Bobby L. Culpepper

Succession of Annie Ruth
Conley Cole Brown

Connie Daniel Cole, Plaintiff-Appellant
v.
Maud C. Osborne and Karl L. Cole,
Defendants-Appellees

No. 39,035-CA

Court of Appeal of Louisiana,
Second Circuit

Oct. 27, 2004

Rehearing Denied Dec. 9, 2004

Connie Daniel Cole, In Proper Person.
Cliffe Charles LaBorde, III, Baton Rouge for Appellees.

Before Williams, Caraway and Lolley, J.J.

Lolley, J.

In this contested will case, Connie Daniel Cole ("Connie") appeals a judgment in the First Judicial District Court, Parish of Caddo, State of Louisiana, which refused to invalidate the last will and testament of Annie Ruth Conley Cole Brown ("Brown"). For the following reasons, we affirm.

Facts

Brown executed her last will and testament (the "will") on August 18, 1999 and died on September 7, 1999. In the will, Brown identified the following children as having been born of her marriage to Connie Dan Cole: Maud Osborne ("Maud"), Connie, Karl Cole ("Karl"), and Jason Cole

("Jason"). In the will, she further stated that no other children had been born to her and that she had not adopted anyone; however, it is disputed that Jason was adopted. Brown's will made specific bequests of immovable property to Jason and Connie, with the remainder of Brown's property going to Maud and Karl.

In June 2000, Maud and Karl attempted to have the will executed and to have a judgment of possession entered. However, Connie refused to either accept or renounce his legacy, and over the next several years he was involved in a dispute with the other legatees over Brown's succession. In January 2004, Karl, as executor of the succession, filed a rule to compel Connie to either accept or renounce his legacy, to compel assertion or dismissal of claims, and to compel a relinquishment of certain succession property. Subsequently, the trial court held a hearing on the rule at which Connie appeared in proper person. Connie pointed out that Jason, contrary to the provisions of the will, was adopted, and he questioned whether the error in the will could be evidence that Brown "could have not really know exactly what she was doing." He also pointed out that Jason's birth date in the will had been manually changed from 1974 to 1973, and that Brown had erroneously signed her name as "Annie R.R. Brown" in one instance in the will.

Opposing counsel pointed out that the will was in valid notarial form and that the introductory clause concerning the information on the children born of the marriage was "biographical information" that was not a necessary component of the will. Although opposing counsel recognized the somewhat "awkward state" he was in as the lawyer before whom the will was executed, he recalled that the changed birth date for Jason was made by the testatrix who, after reviewing the will, recognized that Jason was born in 1973 instead of 1974. It was acknowledged that Jason was an adopted child, but argued that the contrary statement

was in a portion of the will that did not go to its validity. Finally, the additional "R" in Brown's signature was acknowledged, but it was argued that the additional initial also did not go to the validity of the will.

After listening to what the trial court referred to as Mr. Cole's "testimony," the trial court stated that the will was self-proving and that the evidence presented was insufficient to successfully challenge the will. The trial court specifically noted that Brown seemed to have the presence of mind to correct a birth date. The trial court then required Connie to either accept or renounce his legacy. Connie accepted the legacy, but indicated that he wished to appeal the judgment, and this appeal ensued.

Discussion

On appeal, Connie argues that the will should have been invalidated because of the error concerning Jason who, contrary to the will's introductory clause, was not a children born of the marriage, but was an adopted child. Connie argues that Brown's signing a testament "with the incorrect number and relationship to the parties suggests an abnormality or disordered reason or insanity . . ."

Initially, we note that the error concerning Jason is not, by itself, the kind of error that would invalidate a will. Brown obviously intended, through her will, to make a donation *mortis causa* by which she would dispose of all of her property. Brown had four children, one of whom was adopted, and she logically elected to divide her property among those children. She did so through a testament, properly executed, in a form authorized by law. Accordingly, the only way the erroneous statement in the introductory cause of the will could invalidate it would be if the statement constituted clear and convincing evidence that Brown lacked testamentary capacity.

[1,2] All persons have capacity to make and receive donations *mortis causa*, except as expressly provided by law. La. C.C. Art. 1470; *In re Succession of Miller*, 35,244 (La.App.2dCir. 12/07/01), 803 So. 2d 1021, *writ denied*, 2002-0559 (La. 04/26/02), 814So.2d560. To have capacity to make a donation *mortis causa*, a person must be able to comprehend generally the nature and consequences of the disposition that he is making. La. C.C. Art. 1477. There is a presumption in favor of mental capacity and a party alleging lack of capacity must overcome the presumption by clear and convincing evidence. *Succession of Dodson*, 27,969 (La.App.2dCir.02/28/96) 669 So.2d 642. In will contest cases, the factual findings of the trial court are given great weight and will not be disturbed on appeal in the absence of manifest error. *In re Succession of Davis*, 35,217 (La.App.2d Cir.10/31/01), 799 So.2d 1194.

In *Succession of Launius*, 503 So.2d 682 (La.App.3dCir.1987), *writ denied*, 505 So.2d62 (La.04/23/87), a testator's daughter sought to annul the testator's last will and testament for lack of testamentary capacity. The appellate court affirmed the trial court's determination that the daughter failed to establish by clear and convincing evidence that the testator lacked capacity even though a psychiatrist, described by the court as the daughter's most favorable witness, had stated that the testament showed signs of unsoundness of mind. The psychiatrist noted that the will referred to the testator's sister as his "next of kin," but that most people would consider their only child to be their nearest of kin. The psychiatrist

---

1. Although the rule before the trial court also included a request for Connie's relinquishment of certain immovable succession property, the trial court did not resolve that matter because counsel for the succession indicated a willingness to have a survey of the property made and to then further, consider Connie's position on that matter.

indicated this was significant because the testator had carried on extended correspondence with his daughter and had expressed deep affection for her, but had failed to include her in his testament.

[3] In the instant case, Brown included all of her children in her will and, as pointed out by the trial court, had the presence of mind to correct the erroneous birth date given for Jason in the will. Given these factual circumstances, we cannot conclude that the trial court was manifestly erroneous in finding that appellant failed to prove testamentary incapacity by clear and convincing evidence. Instead, we conclude the trial court's decision is quite sound. Accordingly, the judgment of the trial court is affirmed at Connie Daniel Cole's costs.

AFFIRMED.

APPLICATION FOR REHEARING Before Williams, Caraway, Peatross, Drew, and Lolley, J.J. Rehearing denied.

CULPEPPER & CARROLL, PLLC	: RUSTON CITY COURT
VS. NO. 32,421	: PARISH OF LINCOLN
CONNIE D. COLE	: STATE OF LOUISIANA

JUDGMENT

IN THIS MATTER, petition and answer having thereto been filed; said petition having come on for hearing on this date; the law and the evidence being in favor of plaintiff and against defendant for reasons this day orally assigned:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment herein be granted and that there be judgment herein in favor of plaintiff, CULPEPPER & CARROLL, PLLC and against the defendant, CONNIE D. COLE, in the full and true sum of SIX THOUSAND, NINE HUNDRED FIFTY AND 01/100 ($6,950.01) DOLLARS, plus legal interest from date of judicial demand until paid, together with twenty-five per cent (25%) additional on both the principal and interest as attorney's fees and for all costs of these proceedings.

JUDGMENT RENDERED, SIGNED AND FILED at Ruston, Lincoln Parish, Louisiana, on this the 14th day of July, 2004.

_____

JUDGE

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318)227-3700

Wanda W. Neeles
Clerk, Ruston City Court
P. O. Box 1821
Ruston, LA 71273-1821

Danny W. Tatum
Judge, Ruston City Court
P. O. Box 1821
Ruston, LA 71273

Bobby L. Culpepper
Culpepper & Carroll, PLLC
525 East Court Avenue
Jonesboro, LA 71251-3497

Connie Daniel Cole
In Proper Person
163 South Pine Tree Road
Grambling, LA 71245

NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING

March 9, 2005

Docket Number: CA 04-39438

CULPEPPER & CARROLL, PLLC
VERSUS
CONNIE D. COLE

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Diana Pratt-Wyatt
Clerk of Court

Judgment rendered March 9, 2005
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 39,438-CA
COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

CULPEPPER & CARROLL, PLLC Plaintiff-Appellee
Versus
CONNIE D. COLE Defendant-Appellant

Appealed from
Ruston City Court
Parish of Lincoln, Louisiana
Trial Court No. 32,421
Honorable Danny W. Tatum, Judge

CONNIE DANIEL COLE Pro Se
CULPEPPER & CARROLL, PLLC Counsel for Appellee
By: Bobby L. Culpepper

Before Caraway, Peatross & Moore, JJ.

Caraway, J., dissents with written reasons.

PEATROSS, J.

In this dispute over attorney's fees under an alleged contingent fee contract, Defendant, Connie D. Cole, proceeding *pro se* in this appeal, argues that insufficient evidence existed to support the trial court's decision to award Plaintiff, Culpepper & Carroll, PLLC, the sum of $6,950.01, plus legal interest, together with an additional 25 percent on principal and interest as attorney's fees. For the following reasons, the judgment of the trial court is amended and, as amended, affirmed.

FACTS

On April 12, 2004, Culpepper & Carroll, PLLC ("Culpepper"), filed a petition on open account in Ruston City Court against Connie D. Cole ("Cole") seeking $6,950.01, plus legal interest, together with an additional 25 percent on both the principal and interest as attorney fees. Attached to the petition were a November 12, 2003 demand letter and a November 3, 2003 invoice in the amount of $6,950.01 for attorney fees in connection with a matter entitled "Succession of Annie Ruth Brown." The invoice indicated that the balance due was calculated by taking one-third of $21,600.03 and subtracting from it a $250 credit, representing advance court costs paid by Cole. Evidence adduced at the subsequent trial showed that the $21,600.03 represented the amount of a settlement that Culpepper had negotiated with opposing counsel in the succession matter in which Culpepper represented Cole. Thus, the $6,950.01 represented a fee Culpepper claimed had been earned pursuant to a contingent fee contract entered into between Culpepper and Cole.

Cole filed an answer stating that "Mr. Culpepper did this on a contingency fee basis," that Culpepper "quit the case" and that Cole paid Culpepper for court costs, but Culpepper "would not go to court." In a written explanation of his answer, Cole admitted that he consulted with Culpepper on the succession of Annie Ruth Brown, but Cole asserted that he refused any more consultation from Culpepper and pursued the case on his own behalf. He stated that the settlement amount that Culpepper had attempted to get Cole to accept left Cole "feeling as if his counsel was unfaithful and leaving him virtually unrepresented." Cole attached to his answer a copy of a letter from Culpepper to Cole dated September 20, 2000. The letter indicated that Culpepper would handle Cole's legal representation in the succession of Annie Ruth Brown on a contingent fee basis for "one-third of

whatever additional property or money we can get for you." The letter also acknowledged that Cole had already advanced $250 for estimated court costs. The letter then discussed legal issues that Culpepper considered pertinent in the matter, noted that the net value of the estate was $183,000 and indicated that Culpepper considered one-eighth, or $22,900, to be the maximum Cole could get if Cole could be considered a forced heir. Thus, Culpepper's letter indicated to Cole that, since Cole already had received $2,500 in value, $20,400 would be the maximum amount Cole could expect to win in the case.

In addition, the letter indicated that Culpepper probably could get opposing counsel to recommend a settlement to his clients, although they obviously would not pay the entire amount because the law was unclear concerning forced heirship issues under the facts of this case.

When the matter came on for trial on July 14, 2004, counsel for Culpepper first called Cole as an adverse witness. Cole generally was unresponsive as a witness, but did make some critical admissions. Cole admitted that, under the "so-called" will, Cole would have received $2,500 in land, and Cole remembered Culpepper "saying something about if I got a one-eighth interest, but you also told me I didn't qualify for that." Cole then was asked if his counsel had informed him that the estate was willing to pay Cole an additional $21,603 in real estate. Cole responded affirmatively, but stated that he was unsatisfied with that figure. Cole testified as follows regarding the contingent fee agreement:

> Q: (by Culpepper) Okay, but when you came to see me, you didn't have money to pay on an hourly basis. You wanted me to charge a contingent fee of one-third of whatever additional amount of money I could get the people to agree to pay you voluntarily or through court, did you not?

A. (Cole) On, on a -- uh, we agreed on a contingence fee.

Cole was then asked if he had given counsel the authority "to go ahead and make the best settlement that we could" based upon counsel's opinion that if the case went to trial, Cole would lose and would get no more money. Cole responded, "[t]hat's based on your opinion, but on my opinion, I believe that, uh, I would get more."

When asked if Cole had terminated his counsel's services, Cole responded that he did not know, but that he has asked counsel "off of the case." Cole also admitted reporting his counsel to the Bar Association after counsel "quit," and that, after retaining new counsel, Cole eventually reported him to the Bar Association as well. Cole also admitted reporting the attorney representing the estate to the Bar Association.

Finally, when asked if he had received a certified letter demanding payment of the $6,950.01, Cole indicated that he received a certified letter, but stated, "I don't exactly recall what was on the certified letter . . ."

The next witness was Bobby Culpepper of the plaintiff law firm. Culpepper indicated that Cole had first contacted his office in 2000 to complain about Cole's mother's will which had left him only $2,500. According to Culpepper, Cole felt that he should be a forced heir, and there was some discussion concerning whether the forced part would be one-eighth or less than one-eighth. Culpepper testified that he concluded Cole's share probably would be less than one-eighth; but, if Cole received one-eighth of the estate, his share would have been $22,900, so that when the $2,500 was subtracted, Cole stood to get an additional $20,400. Culpepper testified that, after doing substantial research, he determined that Cole could not win. According to Culpepper, Cole "authorized me, at that time, to work out the best settlement that we could work out."

Culpepper then negotiated a settlement in which Cole would get property worth an additional $21,600, which was more than Cole would get if he had been able to establish that he was a forced heir. Culpepper, however, testified that, when the time came to sign settlement papers, Cole would not sign. Culpepper then informed Cole that, because Culpepper did not think Cole could win the case, Culpepper was not going to litigate something "that I felt could not be won and particularly when we were getting more than we would get if we won." Culpepper then sent Cole certified demand letters seeking the $6,950.01 representing one-third of the additional value of the property which Cole would have received if he had accepted his counsel's recommendation. The court asked Mr. Culpepper if there was a written contract for the contingent fee agreement. Mr. Culpepper responded:

> We had a letter agreement, Your Honor. A letter dated September 20, 2000 is attached to his lawsuit. The first paragraph of that as per our agreement handles this matter on a contingency fee basis of one-third of whatever additional property or money we can get for you. And he was agreeable to that because he could not afford to pay on any hourly basis, so he--and, in fact, in papers that are attached to his--to his answer, Your Honor, defendant's answer, he said Mr. Culpepper did this on a contingency fee basis, so there's no question about being an agreement. The, uh, disciplinary board found that there was a contingency fee contract.

When Mr. Cole took the stand on his own behalf, the court asked him if he had asked Mr. Culpepper for a contingent fee arrangement, to which Cole responded, "I asked for a contingency fee arrangement." The court asked Cole if Mr. Culpepper had explained to him that he would "try to get

whatever he could," and whether he explained to Cole why Cole did not need to go to court in the case. Cole responded:

> He told me, and I felt that, you know, we could go to court and I felt we could win if I had representation.

After hearing closing statements, the court concluded that the evidence showed a "contingency fee was present" based on the record, including attachments, letters, testimony in open court and the written admission in Cole's answer that there was a contingent fee arrangement. The court noted that the "work was accomplished" and further noted that, according to the testimony, the results obtained would have been better than if the case had gone to trial on the issue of forced heirship.[1] Thus, the court was satisfied that the plaintiff had met the burden of proof. This appeal followed.

DISCUSSION

On appeal, Cole essentially challenges the sufficiency of the evidence, asserts that the court's ruling did not allow Cole "the right to waive attorney," and argues that he never gave Culpepper authority to settle. The totality of Cole's argument in his appellate brief is contained in the following paragraph:

> There has not been any evidence or law to support the finding of the City Court of Ruston. If there is any evidence or law to support the findings then we ask they are made available to the appellant Connie C. Cole and the Appeals Court. There has been a misconstruction of appellant, Connie D. Cole's right to consult resulting in a denial of his right to waive which is what the case is about. The miscontruing is obvious as no written agreement or contract exists to substantiate this claim. This by an individual that makes his living drawing up

> contracts and agreements to specifics, attorney at law, Bobby L. Culpepper, appellee/plaintiff. The appellant, Connie Cole does not agree he ever at any time agreed that Mr. Culpepper could negotiate any amount and he would agree to pay for whatever settlement he had negotiated whether the appellant approved or not. The appellant has already pursued this case in two courts on his own initiative. This very case in controversy is awaiting to be decided in the appeals court as well.

Contingent Fee Agreement

The first issue we will address is whether the trial court correctly found a contingent fee contract. The provisions of La. R.S. 37:218(A) state:

> By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution, or defense of which he is employed, whether the claim or suit be for money or for property. Such interest shall be a special privilege to take rank as a first privilege thereon, superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial laws. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. Either party to the

[1]See *In re Succession of Annie Ruth Brown*, 39,035 (La. App. 2d Cir. 10/27/04), 886 So. 2d 633, wherein a panel of this court affirmed the trial court's determination that Cole failed to establish that the testator lacked testamentary capacity to execute her will.

> contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition has been made.

The fifth circuit interpreted and applied the writing requirement of 37:218(A) in *Tschirn v. Tschirn*, 570 So. 2d 204 (La. App. 5th Cir. 1990) , *writ denied*, 573 So. 2d 1123 (La. 1991), where there was an oral contingent fee contract, but no written contract. The court reasoned that the purpose of La. R.S. 37:218 is to protect the attorney, not to allow the client to deprive the attorney of his earned fee. The court concluded, therefore, that the absence of a written contingent fee contract does not necessarily render an otherwise binding oral contingent fee contract unenforceable and that the testimony of the attorney claiming the fees, plus general corroborating circumstances, are enough to prove that a contingent fee contract exists between the parties.

In 1997, after the contingent fee agreement in *Tschirn v. Tschirn, supra*, was confected, an amendment to Rule 1.5(c) of the Rules of Professional Conduct became effective which added a provision regarding contingent fee contracts. Rule 1.5(c) now states, in pertinent part:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method

> by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.

In *Tschirn v. Secor Bank*, 96-1992 (La. App. 4th Cir. 3/19/97), 691 So. 2d 1290, *writ denied*, 97-1416 (La. 9/19/97), 701 So. 2d 172, the fourth circuit acknowledged this amendment to Rule 1.5. The court, however, found an oral contingent fee agreement to be binding based on the testimony of the attorney and the client that the parties had agreed on a fee of one-third of any recovery after a reduction of costs paid by the client.[2]

In the case *sub judice*, we conclude that the sufficiency of the contingent fee agreement was admitted by Cole in three respects. First, Cole acquiesced in the contingent fee agreement through his silence upon receipt of Culpepper's letter and his participation in Culpepper's continued work on the matter. Cole attached to his answer a copy of the letter from Culpepper setting forth the contingent fee of one-third "of whatever additional property or money we can get for you." The letter further indicated that Cole would be responsible for paying all the court costs and had already advanced $250. Second, and as previously stated, Cole admitted in his written answer that Culpepper took the case on a contingent basis. Third, Cole testified in open court that he and Culpepper had agreed that the fee would be

[2]The court further held that, in cases where the contingent fee agreement is oral, any ambiguities in the agreement are to be construed against the attorney and in favor of the client.

determined on a contingent fee basis. In fact, during the trial, not only did Cole admit that he and Culpepper agreed to a contingent fee arrangement, but Cole stated that he ***asked*** Culpepper to take the case on contingency because he did not have the money to pay on an hourly basis. This testimony indicates that Cole was aware of the type of fee arrangement into which he was entering and understood how the fee would be determined and paid.

We consider the foregoing evidence sufficient to establish the existence of a binding oral contingent fee contract between Culpepper and Cole. See *Tschirn v. Secor Bank, supra.* Note that our finding herein is limited to the particular facts of this case, with the critical facts being Cole's acquiescence in the agreement, his written admission of the agreement in his answer and, finally, his repeated admission in open court that Culpepper took the case on a contingent basis and that Cole, in fact, asked for a contingent fee arrangement with Culpepper. Accordingly, we find no merit in Cole's allegation of insufficient evidence.

Next, we observe that, by enforcing the contingent fee contract, the court did not refuse to allow Cole "the right to waive attorney." Cole had a right to discharge his attorney and to represent himself; however, Cole did not have the right to deprive his attorney of the contingent fee that his attorney already had earned prior to discharge. As noted, the evidence indicated that Culpepper already had negotiated a favorable settlement for Cole prior to Culpepper's discharge, but Cole refused to sign the settlement agreement.

Finally, Cole argues on appeal that he never agreed that "Mr. Culpepper could negotiate any amount and [Cole] would agree to pay for whatever settlement [Culpepper] had negotiated whether [Cole] approved or not." Louisiana law provides that a party's counsel of record has authority to settle a client's claim only with the client's "clear and express

consent" to do so. *Frederic Hayes, Inc. v. Rollins*, 435 So. 2d 1151 (La. App. 3d Cir. 1983). In *Hayes*, on a record "totally devoid of any evidence demonstrating that the defendant ever consented in any manner whatsoever to the settlement confected" by his counsel, the third circuit found no error in the trial court's finding that there was no settlement of the defendant's claim.

By way of contrast, in *Lockette v. Greyhound Lines, Inc.*, 817 F. 2d 1182 (5th Cir. 1987), a Louisiana case, the plaintiff's counsel testified that the plaintiff had given him general authority to settle her case and had told him simply to "use his best judgment" in arriving at an appropriate settlement of her claim against Greyhound. Based on his testimony, the magistrate made the factual finding that express authority to settle the claim had been given. The Fifth Circuit did not disturb this finding, stating that the magistrate's factual determination that the client had given counsel the "express general authority" to settle was not clearly erroneous. The court in *Lockette* further found that the plaintiff's statements to her counsel to the effect that he was authorized to use his best judgment in settling her case "were sufficient under Louisiana law to constitute a grant of settlement authority." *Lockette, supra.*

Similar to *Lockette, supra*, in the case *sub judice*, Culpepper testified the Cole had authorized Culpepper "to work out the best settlement that we could work out." The trial court found this testimony credible and accepted the same and further noted that Culpepper then worked out a settlement and that Cole then refused to sign the settlement papers.[3] It

[3]Although Cole has not attacked the adequacy of the settlement on appeal, we note, as did the trial court, that the agreement negotiated by Culpepper was more favorable than the amount Cole would have received under a judgment finding him to be a forced heir and, as such, entitled to one-eighth of the estate.

is axiomatic that the trier of fact's decision on such credibility issues is entitled to great deference and will not be disturbed absent manifest error; we detect no such error in the trial court's decision. See *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989).

Additional Attorney Fee Award

Although this suit was styled as a suit on open account, and despite the fact that the judgment was apparently rendered on that
basis, we note that counsel for Culpepper agreed during oral argument that the money owing in this case derives from a contractual obligation, i.e., a contingent fee contract, and is not, therefore, an open account as contemplated by La. R.S. 9:2781(A).

For this reason, the judgment herein is amended to delete the awarded to Culpepper of 25 percent additional attorney fees plus costs under La. R.S. 9:2781(A).

CONCLUSION

For the reasons set forth above, the judgment is hereby amended to delete that portion of the judgment awarding Culpepper & Carroll, PLLC, additional attorney fees of 25 percent for pursuit of the alleged open account. As amended, the remainder of the judgment is affirmed. Costs of appeal are assessed to Defendant/Appellant, Connie D. Cole.

AMENDED AND, AS AMENDED, AFFIRMED.

CARAWAY, J., dissenting

I respectfully dissent.

This case bears out the adage, hard facts make bad law. Certainly, there are hard facts evident from what appears to have been very good legal representation from Mr. Culpepper who has gone uncompensated for his services. Providing him compensation in a manner given by the majority, however, makes for bad law. This is bad law for the attorney/client relationship within contingent fee contracts and misconstrues the nature of such contracts and the rights of the attorney under the contract, thus missing well-established concerns for the regulation of the practice of law.

There are two glaring facts that somehow got lost in the lengthy reasoning of the majority. First, the ultimate "outcome of the matter" between Mr. Cole and his mother's estate has yielded him nothing. See *In re Succession of Brown*, 39,035 (La. App. 2d Cir. 10/27/04), 886 So. 2d 633 (where Mr. Cole represented himself *pro se* and lost after Mr. Culpepper's withdrawal). One-third times Mr. Cole's award or "outcome of the matter" is how the fee is mathematically calculated. The contingent part of the equation is the "outcome of the matter," and it never materialized in Mr. Cole's favor in this case. One-third times zero equals no contingency fee.

This is the clear precedent of the ruling in *Frederic Hayes, Inc. v. Rollins*, 435 So. 2d 1151 (La. App. 3d Cir. 1983). There, the client rejected a $30,000 settlement offer and received nothing. When the attorney sued for his one-third contingency fee equaling $10,000, the court said no such fee could be awarded because the contingency of a positive outcome to the client produced no award.

More importantly, the Louisiana Supreme Court and the lower courts have an inherent judicial power concerning the regulation of the practice of law which entails "the responsibility to exert control by adjudicatory means of

individual cases as they arise, including those relative to discharge of counsel and regulation of fees, whether by contingency contract or otherwise." *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96), 683 So. 2d 697, 700; *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1979). From the rules of professional conduct and the decisions of our supreme court, it is clear that an attorney with a contingency fee contract is never vested with an ownership or proprietary interest in the cause of action or subject matter of the litigation. Rules of Professional Conduct, Rule 1.8(i); *Saucier, supra; Scott v. Kemper Ins. Co.*, 377 So. 2d 66 (La. 1979). To avoid offending the disciplinary rules regarding discharge of counsel (Rule 1.16) and the client's direction of the representation and settlement (Rule 1.2a), the court in *Saucier* limited the contingency fee interest of the attorney to "no more than a *privilege* granted to aid the attorney's collection of a fully-earned fee out of the *fund* which the satisfaction of the client's claim yields. *Id.* at 117 (emphasis added). Louisiana privileges attach primarily to a specific thing or fund. La. C.C. Art. 3189; *Republic Supply Co. v. Carthay Land Co.*, 244 So. 2d 241 (La. App. 4th Cir. 1971). There is nothing for Mr. Culpepper's privilege to attach to in this case because Mr. Cole never recovered an award or fund for the satisfaction of his claim against his mother's estate. To allow the attorney an ownership interest in a settlement rejected by the client, and to then translate that ownership interest into a personal money judgment against the client who recovered nothing, ignores multiple and serious concerns embodied in the rules of professional conduct.

Second, Mr. Culpepper's lengthy letter of September 20, 2000, provides a commendable discussion and assessment of the claim to his client, and it certainly gives a written basis for the parties' agreement for a one-third contingency fee contract as found by the majority. Yet, the discussion of the difficult legal matters of forced heirship and succession law and Mr. Culpepper's assessment of the values of the estate

and the estimated $22,900 maximum recovery leave much room for the lay person to be confused or to disagree. Recognizing this and properly following Rule 1.2(a), Mr. Culpepper concluded the letter by conceding to Mr. Cole "[w]e need to think about all this and see what you would be willing to do." Clearly, Mr. Cole was never willing to settle for the $21,600.03 offer which Mr. Culpepper skillfully obtained. Therefore, the majority is mistaken in relying on Mr. Culpepper's stated belief that he was authorized to work out the best settlement possible. Honoring the rules of professional conduct, Mr. Culpepper, appropriately, never felt comfortable in signing a settlement release for his client and cashing the $21,600.03 settlement check. If he had clear and express unilateral authority from his client to settle for $21,600.03, this suit to collect his fees would never have occurred.

The hard fact of this case, as indicated above, is that Mr. Culpepper may very well have obtained a more valuable settlement proposal than any outcome Mr. Cole could ever have received after a court's judgment. Mr. Cole appears imprudent for rejecting the settlement. He certainly has not exhibited even an elementary understanding of the complicated nature of his claims. But these things sometimes occur in an attorney/client relationship, and the disappointing risk of a client who dooms any possibility for a positive outcome for the matter is one of the reasons why this is called a contingency fee relationship. As the court concluded in *Hayes, supra*, other remedies may be available to compensate the attorney for his actual services, and I would remand to allow consideration of another theory of recovery for Mr. Culpepper.

Finally, as indicated above, the law of this case will now be applicable to any contingency fee contract, and the appearance of impropriety to the public will be significant. For example, an attorney might advise a client in a similar

assessment/contingency fee letter that the expected range of recovery of his personal injury claim is between $10,000 and $50,000. The attorney could strongly recommend in the letter that any settlement offer of $30,000 be accepted immediately, yet conclude to the client that he needs "to think about all this and see what you would be willing to do." Immediately after filing such a personal injury suit, if a $30,000 settlement is offered, the attorney may, under this ruling, withdraw from representation and obtain a personal judgment against the client for a one-third fee or $10,000, for the client's refusal to settle. Thereafter, when the client proceeds to trial and receives a verdict granting a low award of $10,000 in damages, the client must use that entire award to pay his former attorney. This problem picture can be further exacerbated if we assume that the hypothetical attorney expended only $1,000 worth of fees measured on an hourly basis before he decided to withdraw from the case. This is the broad implication of the majority's ruling. It violates the regulation of the practice of law for the contingency fee relationship as addressed in *Saucier*, and I respectfully dissent.

SUPREME COURT OF LOUISIANA
NO. 05-C1136

CULPEPPER & CARROLL, PLLC
V.
CONNIE D. COLE

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, PARISH OF LINCOLN,
STATE OF LOUISIANA

PER CURIAM

Connie Daniel Cole seeks review of a judgment of the court of appeal affirming an award of attorney's fees to his former counsel. For the reasons that follow, we reverse the judgment of the court of appeal.

FACTS AND PROCEDURAL HISTORY

Connie Daniel Cole retained attorney Bobby Culpepper of the law firm of Culpepper & Carroll, PLLC to represent him in a contest of his mother's will. Mr. Cole requested that the firm handle the matter on a one-third contingency fee basis, and Mr. Culpepper agreed to do so. On September 20, 2000, Mr. Culpepper sent Mr. Cole a letter in which he confirmed that he would accept the representation on a contingent fee basis of one-third "of whatever additional property or money we can get for you."

After negotiation between Mr. Culpepper and counsel for the estate of Mr. Cole's mother, Mr. Cole was offered property worth $21,600.03 over and above what he would have received under the terms of the decedent's will. Mr. Culpepper thought the compromise was reasonable and recommended to Mr. Cole that he accept the offer.

However, Mr. Cole refused to settle his claim for that amount, believing he was entitled to a larger share of his mother's succession as a forced heir. When Mr. Culpepper refused to file suit in the matter, Mr. Cole terminated his representation. Mr. Cole then proceeded in proper person to challenge his mother's will, but he was unsuccessful and recovered nothing.[1]

On April 12, 2004, Mr. Culpepper filed "Petition on Open Account" on behalf of the Culpepper law firm. The suit was filed in Ruston City Court against Mr. Cole, seeking the sum of $6,950.01,[2] plus legal interest, together with 25% on the principal and interest as additional attorney's fees and a demand letter to Mr. Cole seeking the payment of "the entire balance of $6,950.01 that you owe Culpepper & Carroll, PLLC."

Mr. Cole, appearing in proper person, answered the law firm's petition and denied that he owed any money. Mr. Cole explained in his answer that "Mr. Culpepper did this on a contingency fee basis," that Mr. Culpepper "quit the case," and that Mr. Cole paid court costs but Mr. Culpepper "would not go to court."

Following a trial on the merits, at which both parties testified, the city court rendered judgment in favor of the law firm, awarding the sum of $6,950.01, plus legal interest from the date of judicial demand until paid, together with 25% on the principal and interest as additional attorney's fees, and

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[1] See *Succession of Brown*, 39,035 (La. App. 2nd Cir. 10/27/04), 886 So. 2d 633, *writ denied*, 05-0030 (La. 3/18/05), 896 So. 2d 1006.

[2] This sum represents one-third of the $21,600.03 in property Mr. Cole would have received had he accepted Mr. Culpepper's settlement recommendation, less a credit of $250 for costs paid by Mr. Cole in advance.

costs. In oral reasons for judgment, the city court judge stated that a "contingency fee was present" based on the record, including the testimony in open court and the written admission in Mr. Cole's answer that there was a contingent fee agreement. The court noted that "work was accomplished" by Mr. Culpepper and further noted that, according to the testimony, the settlement would have produced a better result than if the case had gone to trial on the issue of forced heirship. Thus, the court was satisfied that the law firm met its burden of proof.

Mr. Cole appealed the city court's judgment, and in a 2-1 ruling, the court of appeal amended the judgment and affirmed. *Culpepper & Carroll, PLLC v. Cole*, 39,438 (La. App. 2nd Cir. 3/9/05), 896 So. 2d 341. The majority agreed that a valid contingent fee contract existed between Mr. Cole and Mr. Culpepper, and found that by refusing to sign the "favorable settlement" negotiated by Mr. Culpepper before he was discharged, Mr. Cole was in effect depriving Mr. Culpepper of the contingent fee he had already earned. Accordingly, the court of appeal affirmed the award to Mr. Culpepper of $6,950.01 in attorney' fees, plus legal interest. However, the court of appeal found that the money owing in this case does not derive from an open account, but rather from a contractual obligation in the form of a contingent fee agreement. Based on this reasoning, the court of appeal amended the trial court's judgment to delete the award to the law firm of 25% additional attorney's fees plus costs under the open account statute.

Judge Carraway dissented. He recognized that a contingent fee contract existed in this case, but found that because there was ultimately no recovery in the case, no fee was due to Mr. Culpepper. Judge Carraway further observed that to allow an attorney to collect a fee when the client rejects a settlement offer and later recovers nothing "ignores multiple

and serious concerns embodied in the rules of professional conduct."

Upon Mr. Cole's application, we granted certiorari to review the correctness of the court of appeal's ruling. *Culpepper & Carroll, PLLC v. Cole*, 05-1136 (La. 6/24/05), 904 So. 2d 746.

DISCUSSION

As a threshold matter, we note the trial court made a finding of fact that a contingent fee contract existed between Mr. Cole and Mr. Culpepper. Based on our review of the record, we find no manifest error in this determination.

Having found a contingent fee contract exists, we now turn to the question of whether Mr. Culpepper is entitled to recover any attorney's fees under this contract. Pursuant to the parties' agreement, Mr. Culpepper is entitled to one-third "of whatever additional property or money" he obtained on behalf of Mr. Cole. It is undisputed that Mr. Cole recovered no additional property or money as a result of the litigation against his mother's estate. Because Mr. Cole obtained no recovery, it follows that Mr. Culpepper is not entitled to any contingent fee.[3]

Nonetheless, Mr. Culpepper urges us to find that his contingency should attach to the settlement offer he obtained on behalf of his client, even thought his client refused to accept that offer. According to Mr. Culpepper, he did the work for which Mr. Cole retained him, and he is therefore entitled to one-third of the amount offered in settlement, notwithstanding Mr. Cole's rejection of the settlement offer.

[3]As Judge Caraway aptly observed, "One-third of zero equals no contingency fee." His mathematic acumen is impeccable in this instance.

With the benefit of hindsight, it would have been in Mr. Cole's best interest to accept the settlement offer obtained by Mr. Culpepper. However, it is clear that the decision to accept a settlement belongs to the client alone. See Rule 1.2(a) of the Rules of Professional Conduct ("A lawyer shall abide by a client's decision whether to settle a matter."). Therefore, regardless of the wisdom of Mr. Cole's decision, his refusal to accept the settlement was binding on Mr. Culpepper.

To allow Mr. Culpepper to recover a contingent fee under these circumstances would penalize Mr. Cole for exercising his right to reject the settlement. We find no statutory or jurisprudential support for such a proposition. Indeed, this court has rejected any interpretation of the Rules of Professional Conduct which would place restrictions on the client's fundamental right to control the case. See, e.g., *Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1979) (on rehearing) ("But the Disciplinary Rule implicitly recognizing the client's absolute right to discharge his attorney is stripped of effect if the client's exercise of that right is conditioned upon his payment of the full amount specified in the contract.").

In summary, we find that Mr. Culpepper did not obtain any recovery on behalf of Mr. Cole. In the absence of a recovery, it follows that Mr. Culpepper cannot collect a contingent fee for his services.4 Accordingly, we must reverse the judgment of the court of appeal awarding a contingent fee to Mr. Culpepper.

DECREE

For the reasons assigned, the judgment of the court of appeal is hereby reversed. All costs in this court are assessed against plaintiff.

4As an alternative to his claims under the contingent fee contract, Mr. Culpepper also seeks attorney's fees under the theory of quantum meruit. Because there was no recovery by the client, it follows there is no basis for quantum meruit recovery. See generally *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96), 683 So. 2d 697; *Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1979) (on rehearing).

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE RELEASE NEWS RELEASE #034

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the 23rd day of June, 2006, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

2003-KA-3067 STATE OF LOUISIANA V. MICHAEL WEARY (Parish of Livingston) JOHNSON, J., would grant a rehearing.
WEIMER, J., would grant rehearing in part and assigns reasons.

2005-CA-0612 C/W LLOYD BADEAUX AND LAURA M. BADEAUX V. SOUTHWEST COMPUTER BUREAU, INC. (Parish of Ascension)
2005-CA-0719 Retired Judge Robert J. Klees, assigned as Associate Justice Ad Hoc, for Chief Justice Pascal R. Calogero, recused; and Retired Judge Lemmie O. Hightower, assigned as Associate Justice Ad Hoc, for Associate Justice John L. Weimer, recused.

2005-K-0964 STATE OF LOUISIANA V. JACK S. SPEARS (Parish of Lincoln)

2005-C-1136 CULPEPPER & CARROLL, PLLC V. CONNIE D. COLE

2005-B-1736 IN RE: JOEL G. PORTER (Disciplinary Board)

REHEARING(S) NOT CONSIDERED:

2004-OB-1819 IN RE: LILIANA G. ROJAS

2004-OB-2364 IN RE: VALENTINA LAMONT